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No. 89-599

In The

Supreme Court of the United States

October Term, 1989

EASTER HOUSE, an Illinois Not-for-Profit Corporation,

Petitioner,

v.

THOMAS FELDER, FLORENCE MCGUIRE, and JOAN SATOLOE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Assuming arguendo petitioner was deprived of property under color of state law, does *Parratt v. Taylor* bar this action where the purported property deprivation was random and unauthorized and not pursuant to an established state procedure, and where petitioner failed to pursue, and expressly rejected, adequate post-deprivation remedies under Illinois law?

2) Are respondents, state licensing officials, entitled to ~~a~~ qualified immunity from money damages for their discretionary decisions recommending the licensing of two adoption agencies?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The Departure of Smith From Easter House 1

B. The Decision To Renew The License Of Easter House 2

C. The Decision To License Smith's New Agency 4

D. History Of The Case Below 6

REASONS FOR DENYING THE WRIT: 7

I. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT *PARRATT V. TAYLOR* BARRED THIS CLAIM WHERE ADEQUATE STATE REMEDIES EXISTED TO REDRESS THE PURPORTED RANDOM AND UNAUTHORIZED PROPERTY DEPRIVATIONS SUSTAINED BY EASTER HOUSE 7

A. Introduction 7

B. Before the *Parratt* Issue Can Be Squarely Reached, Other Important Issues Posed By This Record Would Have To Be Resolved 7

C. If *Parratt* And *Hudson* Could Be Circumvented Merely By Pleading "Conspiracy," Or The "High-Rank" Of The State Actor, The Holdings Of Those Cases Would Be Severely, And Incorrectly, Limited 9

TABLE OF CONTENTS – Continued

Page

II. BECAUSE OF ITS UNIQUE FACTS, THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD TO RESOLVE A CIRCUIT CONFLICT, IF ONE EXISTS AT ALL..... 12

III. EVEN IF THE *PARRATT* ISSUE WERE REACHED, THE DEFENDANTS WOULD HAVE A QUALIFIED IMMUNITY FROM MONEY DAMAGES 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987) 14, 15

Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985) (*en banc*) 13

Brown v. Trench, 787 F.2d 167 (3d Cir. 1986) 12

Burch v. Apalachee Community Mental Health Services, 840 F.2d 797 (11th Cir. 1988)(*en banc*) cert. granted sub. nom. *Zinermon v. Burch*, ___ U.S. ___, 109 S.Ct. 1337 (1989) 13

Davis v. Scherer, 468 U.S. 183 (1984) 14

Dwyer v. Regan, 777 F.2d 825 (2d Cir. 1985) 12

Easter House v. Felder, 879 F.2d 1458 (7th Cir. 1989)(en banc) 6, 9, 10, 14

Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987) 12

Fields v. Durham, 856 F.2d 655 (4th Cir. 1988) 11

Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986) vacated, ___ U.S. ___, 107 S.Ct. 3254 (1987) 13

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 13

Holloway v. Walker, 790 F.2d 1170 (5th Cir.), cert. denied, 479 U.S. 984 (1986) 11

Hudson v. Palmer, 468 U.S. 517 (1984) 10, 11, 12

Labov v. Lalley, 809 F.2d 220 (3d Cir. 1987) 13

Lavicky v. Burnett, 758 F.2d 468 (10th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) 12

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) .. 10, 11

TABLE OF AUTHORITIES – Continued

Page

Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) 9

Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987) 12

Messick v. Leavins, 811 F.2d 1439 (11th Cir. 1987) 13

Moore v. Warwick Public School District, 794 F.2d 322 (8th Cir. 1986) 12

Paul v. Davis, 424 U.S. 693 (1976) 8

Parratt v. Taylor, 451 U.S. 527 (1981) 7, 9, 10, 11, 12, 13, 14, 15

RR Village Association Inc. v. Denver Sewer Corp., 826 F.2d 1197 (2d Cir. 1987) 13

Sinaloa Lake Owners v. City of Simi Valley, 864 F.2d 1475 (9th Cir. 1989) pet. for cert. pending, No. 89-473 12

Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), rev'd on other grounds, sub. nom. *Memphis Comm. School Dist. v. Stachura*, 474 U.S. 918 (1986) 12

Stana v. School Dist. of City of Pittsburgh, 775 F.2d 122 (3d Cir. 1985) 12

Wolfenbarger v. Williams, 774 F.2d 358 (10th Cir. 1985) 12

STATUTES

42 U.S.C. 1983 8

Illinois Revised Statutes (1973), Ch. 23 §2211 et seq. (Illinois Child Care Act) 14, 15

Ill. Rev. Stat. (1973) ch. 23 §2227 8

STATEMENT OF THE CASE

A. The Departure of Smith from Easter House

On December 30, 1974, Millicent Smith, then the Executive Director of Easter House, met with Florence McGuire, a licensing supervisor of the Illinois Department of Children and Family Services (DCFS). (Pl. Ex. 110) The respondents (referred to below as DCFS staff), McGuire, Joan Satoloe, and Thomas Felder, were all DCFS officials and professional social workers dealing with the licensing of child welfare agencies, including adoption agencies, in the Chicago area.

Smith told McGuire she was leaving Easter House to start her own agency. She complained that Seymour Kurtz, the President of Easter House, was permitting unauthorized individuals access to agency files, and "hustling" clients with incomes over $50,000 to adopt children. (Pl. Ex. 110, Tr. 329) She complained that Kurtz had set up "foundations" in The Hague, Netherlands, and in Mexico to facilitate placement of Mexican babies, and that Kurtz told her he expected to "make a million" through this system.[1] (Px 110, Tr. 331) Smith felt her authority at the agency was being undermined. (Pl. Ex. 110) Her departure was not amicable.

Smith told McGuire her new agency would be called Easter House Adoption Agency, Inc., and that she was

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[1] Evidence at trial established that the Netherlands foundation, Stichting Susu, was merely a letter drop. Mail directed to it was answered at Easter House's office in Chicago and sent back to the Netherlands for posting, giving the impression the letter was answered in Europe. (Def. Ex. 54, Tr. 854-55)

removing case files from Easter House to preserve their confidentiality. (Tr. 386, Pl. Ex. 170) She was strongly admonished by McGuire not to use the name Easter House; having two agencies with that name would only cause confusion. (Tr. 353) She was also admonished that the files were not hers and belonged to Easter House. (Tr. 354) Smith was adamant that the name Easter House belonged to her, because of her years of work with the agency. (Tr. 353, 1123)

Smith's departure from Easter House came at a time when the two-year state license of Easter House was expiring. Indeed, the license expired technically on December 1, 1974. (Def. Ex. 32) An initial license study by Satoloe indicated DCFS staff would recommend that the license be renewed. However, the departure of Smith (and another social worker she was taking with her), and the serious allegations she was making, changed the circumstances. Easter House was now without sufficient professional staff required by DCFS regulations. (Tr. 712) After the meeting with Smith, McGuire called DCFS headquarters in Springfield to ask that the new license for Easter House, which had not yet been mailed, be held pending further investigation of Smith's charges. (Tr. 332, Pl. Ex. 110)

B. The Decision To Renew The License Of Easter House

DCFS staff were now faced with two decisions: whether to re-license Easter House, and whether to license Smith's new agency. We address first the relicensing of Easter House.

On January 6 and January 8, 1975, Felder sent Kurtz two certified letters. The January 6 letter said that the lack of staff meant Easter House was not licensed and would have to reapply. (Pl. Ex. 121) The January 8 letter said Easter House had ten days to request a hearing, otherwise the Department's decision was final. (Pl. Ex. 124) Felder consulted DCFS legal counsel in the preparation of these letters. (Pl. Ex. 107) Kurtz received both letters on January 21, 1975. (Pl. Ex. 139, 163) (The delay was occasioned by Smith, who, unbeknownst to DCFS, tried to redirect the agency's mail to her new office). (Pl. Ex. 163) Easter House remained open during this time, and no action was taken by DCFS to close it. Judge Comerford, who supervised adoptions in the Cook County Circuit Court, was notified Easter House's license had expired and that it needed to reapply. (Pl. Ex. 123) Others who made inquiry in early January were similarly told Easter House was under review at this time. (Tr. 1198) Kurtz, however, admitted that until he hired a new Executive Director he could not complete any adoption in any event, regardless of the license status of Easter House. (Tr. 874)

Kurtz hired a new Executive Director to replace Smith on January 21, 1975. (Tr. 526) On February 4, 1975, Kurtz and Felder met. (Pl. Ex. 107) Kurtz told Felder that if DCFS found the new Executive Director acceptable, he would waive the formal hearing offered him in the January 8 letter. (Tr. 967) On February 5, 1975, a letter of introduction from the new Executive Director, Rose Cummings, was delivered to DCFS. (Pl. Ex. 107) She was interviewed and her credentials approved on February 11, 1975. (Tr. 520) DCFS staff recommended release of the

license on February 17, 1975, and the license was received by Easter House on February 19, 1975. (Pl. Ex. 107, 160) Judge Comerford was notified of this resolution. (Pl. Ex. 168) No reapplication by Easter House was required. (Tr. 1080)

Felder notified the Director of DCFS of this resolution also:

> As you are aware, the license of Easter House I was released 2-18-75. The only definable basis for withholding the license was the absence of staff meeting qualifications set for (sic) in CFS Regulation 5.10. This was overcome by the appointment of Mrs. Rose Cummings and other staff who appear to meet minimum qualifications. Although Easter House I's license was released, we remain uneasy about the manner in which persons contacting a child welfare agency are channeled through the series of organizations headed by Mr. Kurtz (Stiching Susu, Tyzril Foundation, Easter House I, Casa Del Sur). . . . (Def. Ex. 37)

Illinois law did not regulate the foreign foundations created by Kurtz, though DCFS staff had ongoing concerns over the way he was using them.

C. The Decision To License Smith's New Agency

We now turn to the license application of Smith for Easter House Adoption Agency, Inc. (sometimes called for clarity Easter House II). Her actions created a number of complications. First was the corporate name. Although DCFS was troubled by her choice of name, the staff concluded – supported by DCFS legal counsel – that DCFS had no jurisdiction over corporate names. (Tr. 742)

Indeed, the Illinois Secretary of State, who must approve corporate names for Illinois corporations, permitted Smith to use the name Easter House.

Smith's removal of files raised another question. Smith told DCFS, Kurtz, and Judge Comerford that she returned to Kurtz all the files she removed. (Pl. Ex. 170) Felder took the position that this issue of private property should be resolved by Kurtz and Smith on their own. (Tr. 996)

In addition, Smith tried to place a child with an Easter House client before her agency was licensed. She was discovered and her involvement stopped; she earned no fee on the placement. Felder referred this matter to the State's Attorney's office. (Pl. Ex. 172) He admonished Smith she should not have done this while her own license application was still pending. (Def. Ex. 26, 36) (Tr. 1357)

Despite the various complications associated with Smith's application, DCFS approved the new license in early March, 1975. (Def. Ex. 20) The usual charter study and license study of the new organization were completed.[2] (Def. Ex. 9, 12) The DCFS staff recommended that

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[2] This was disputed during the trial. Some people associated with the new agency testified they did not recall being interviewed, or were not interviewed, by Satoloe. It was not disputed, however, that every action by Smith alleged to be improper was conveyed by respondents through the appropriate channels of DCFS.

Smith be licensed "despite the many complications" and concluded that "this organization [is] in reasonable compliance with minimum licensing standards." (Def. Ex. 37) They also concluded that in their prior association with Smith, they found her to be "professionally competent and responsible." (Def. Ex. 37) (Smith had been Executive Director of Easter House for ten years).

When Smith was licensed on March 5, 1975, she was specifically told by the Director of DCFS:

> Easter House may wish to take action against your use of this [corporate] name with the Secretary of State and through other court action under the Illinois Common Law. (Def. Ex. 20)

Easter House took no action in state court to enjoin her use of the name, to recover files, or to collect damages for her attempting to place a child with its clients before she was licensed.

D. History Of The Case Below

The case was submitted to the jury as a conspiracy between Smith and respondents to deprive Easter House of its property without due process of law, in the way its license was withheld and Smith's granted, and as to the corporate name, files, and injury to its business. A second count alleging harassment of Easter House in 1977 was also submitted to the jury. The jury returned a verdict in favor of Easter House on both counts. Smith did not appeal. The Seventh Circuit, sitting *en banc*, reversed the conspiracy count by a vote of 9-2, and the harrassment count 11-0. *Easter House v. Felder*, 879 F.2d 1458 (7th Cir. 1989). Easter House then sought review in this Court.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT *PARRATT V. TAYLOR* BARRED THIS CLAIM WHERE ADEQUATE STATE REMEDIES EXISTED TO REDRESS THE PURPORTED RANDOM AND UNAUTHORIZED PROPERTY DEPRIVATIONS SUSTAINED BY EASTER HOUSE.

A. Introduction

This is not an appropriate case for this Court's certiorari jurisdiction. The peculiar facts of this case – two contending private adoption agencies, one seeking a new license and the other renewal of its license, with both using the same corporate name – are highly unusual and unlikely to recur. The Circuit conflict, if one exists at all, would not be resolved by this case because of its unique facts. In addition, this Court would have to resolve a number of subsidiary legal issues, described below, before the *Parratt* issue is reached. In any event, the *en banc* Seventh Circuit correctly decided the issues below. This was essentially a state law case, not a federal constitutional case.

B. Before the *Parratt* Issue Can Be Squarely Reached, Other Important Issues Posed By This Record Would Have To Be Resolved

Even before one reaches the *Parratt* question, a logically prior question must be answered: was Easter House deprived of any property interest at all under color of state law? Easter House was never *finally* deprived of any property interest in its license to operate. It received notice in the January 6, 1975, letter that its license expired and would have to reapply. It was given an opportunity

to be heard in the letter of January 8, 1975. Those letters did not constitute final agency action depriving it of its license. They were the beginning of the process, not the end.

Moreover, Easter House received informal due process: Felder and Kurtz met on February 4, 1975; at that time, Kurtz waived a formal hearing. Illinois law provided an administrative hearing for refusal to renew a license with the right to counsel, cross-examination, etc.; the results of that hearing are subject to review in the Illinois Circuit Court, with appeal to the Illinois Appellate and Supreme Courts.[3] This system of review provided all the process that was due Easter House. Receipt of its license after it hired a new Executive Director simply ended the matter. There was no property deprivation; and even if there was, adequate post-deprivation remedies were available under Illinois law.

Informing interested persons of the truth – that Easter House would have to reapply for a new license because of its lack of staff and that its program was under review – is not a constitutional tort. If defamation is not actionable under 42 U.S.C. 1983, *Paul v. Davis*, 424 U.S. 693 (1976), neither is the truth. And the ultimate licensing of Smith's agency cannot *ipso facto* constitute a constitutional deprivation to Easter House, its competitor.

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[3] Ill. Rev. Stat. 1973, ch. 23 § 2227 provided that a final agency decision refusing to renew a license is subject to administrative review under the Illinois Administrative Review Act, providing for review in the Illinois Courts.

The Seventh Circuit thus expressed serious reservations, even before reaching the *Parratt* issue, that there was an actual property deprivation here to begin with.[4] *Easter House v. Felder*, 879 F.2d at 1466.

C. If Parratt and Hudson Could Be Circumvented Merely By Pleading "Conspiracy," Or the "High-Rank" Of The State Actor, The Holdings Of Those Cases Would Be Severely, And Incorrectly, Limited.

Let us assume for the sake of argument all the dubious premises petitioner advocates: a conspiracy, that Smith's actions are under color of state law, and that the short delay in renewing Easter House's license was a property deprivation. Even so, the decision below is entirely correct and not in conflict with other cases deciding very different factual scenarios.

In *Parratt v. Taylor*, 451 U.S. 527 (1978), this Court held that when a random and unauthorized property deprivation occurs under color of state law, the state

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[4] One additional threshold problem should be noted. Smith's actions were not done "under color of law", unless a conspiracy is shown. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). Because the general jury verdicts were based on a wholly improper, erroneous jury charge rejected by the Seventh Circuit, it is incorrect to assume, as petitioner does, that a "conspiracy" was proven at trial. Respondents strongly disputed as a factual matter any improper activity in the licensing of either agency, and objected that the jury charge permitted Smith's actions to be imputed so broadly to them. (Tr. 1438-39)

must be given an opportunity to provide adequate post-deprivation remedies. In such a situation, adequate post-deprivation remedies provide all the process that is due. Intentional conduct by the state actor is subject to the same rule. *Hudson v. Palmer,* 468 U.S. 517 (1984). At the other end of the continuum is *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). If the property deprivation is the result of an established state procedure, and not of a random and unauthorized act, then the state action is complete at the time the initial deprivation occurs; subsequent remedies are of no significance.

The decision below correctly aligned this case under *Parratt* and not *Logan.* Easter House has never contended that a private party's use of a corporate name or her removal of files or placement of a child, is conduct which could be anticipated by the state before the fact and a hearing given. Rather, Illinois law provided a host of remedies after the fact for Easter House. It could have sued Smith for conversion of the files, sought an injunction for her use of the corporate name, an accounting, or damages. See *Easter House v. Felder,* at 879 F.2d at 1475 for a full catalog of possible Illinois remedies available to Easter House. Inexplicably, Easter House sought to do none of those things.

In connection with its license renewal, Easter House was in fact given informal and formal pre-deprivation due process in connection with its license. It was offered a formal hearing, which it declined.[5]

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[5] Felder testified he always intended to preserve Easter House's right to a formal hearing. (Tr. 221)

Easter House seeks to limit *Parratt* and *Hudson* to "low level" state employees, not "high-ranking" employees such as respondents. Respondents were in fact middle-level employees who could initiate license revocation proceedings but could not finally revoke a license. Moreover, the Director remained free to disregard their recommendations. (Tr. 210, 1258) The distinction between "low" and "high" is unworkable in practice and would severely limit the scope of *Parratt* and *Hudson*. As long as the state retains the ability to provide post-deprivation process, rank is not determinative. *Fields v. Durham*, 856 F.2d 655, 658-59 (4th Cir. 1988); *Holloway v. Walker*, 790 F.2d 1170, 1173 (5th Cir.), cert. den. 479 U.S. 984 (1986). Only when the state actor deprives someone of property and extinguishes the post-deprivation remedy (normally only "high-ranking" officials will be in a position to do this) could an argument be made that this is a *de facto* state procedure subject to *Logan*. As we have tried to show, that is far from the case here.

Petitioner also contends the conduct here is not "random and unauthorized." Yet the Seventh Circuit found that, even if the respondents did not follow the Illinois Child Care Act or state procedures to the letter, this is not actionable in federal court. Violation of state law does not equal violation of the Fourteenth Amendment. "Random and unauthorized" in this context must be viewed from the ultimate policy-making authority of the state, the legislature, who prescribed elaborate procedures for correction of errors (including judicial remedies as extensive as review in the Illinois appellate courts).

Petitioner also contends that *Parratt* should not apply because it alleged a conspiracy. If *Parratt* and *Hudson*

could be circumvented so easily by pleading a conspiracy, those cases would have no meaning. If one state actor (such as the correctional officer in *Parratt*) destroys property, there is no constitutional claim; if two officers "conspire" to destroy the same property, Easter House says the result should change. The rationale of *Parratt* and *Hudson* is more durable than that.

II. BECAUSE OF ITS UNIQUE FACTS, THIS CASE DOES NOT PRESENT AN APPROPRIATE RECORD TO RESOLVE A CIRCUIT CONFLICT, IF ONE EXISTS AT ALL.

This is not an appropriate case to resolve the Circuit conflict described by Easter House, if such a conflict exists at all. There simply is no "majority" or "minority" view. Different cases involving different fact patterns are decided differently. The cases cited by Easter House as representing a "majority" view break down, almost without exception, into three categories: (a) a public employee is terminated without a hearing, *Dwyer v. Reagan*, 777 F.2d 825 (2nd Cir. 1985); *Stana v. School Dist. of Pittsburgh*, 775 F.2d 122 (3rd Cir. 1985); *Brown v. Trench*, 787 F.2d 167 (3rd Cir. 1986); *Fetner v. City of Roanoke*, 813 F.2d 1183 (11th Cir. 1987); *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987); *Moore v. Warwick Public School Dist.*, 794 F.2d 322 (8th Cir. 1986); *Stachura v. Truszkowski*, 763 F.2d 211 (6th Cir. 1985), reversed on other grounds *Memphis Comm. School Dist. v. Stachura*, 474 U.S. 918 (1986); (b) the physical destruction, or irrevocable taking, of real or personal property by a state official, *Lavicky v. Burnett*, 758 F.2d 468 (10th Cir. 1985); *Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985); *Sinaloa Lake Owners v. City of Simi Valley*, 864 F.2d

1475 (9th Cir. 1989), petition for cert. pending No. 89-473; *RR Village Association Inc. v. Denver Sewer Corp.*, 826 F.2d 1197 (2nd Cir. 1987) (rate increase by town); *Messick v. Leavins*, 811 F.2d 1439 (11th Cir. 1987); (c) cases involving liberty interests, substantive constitutional rights, or tampering with the judicial process itself, *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985); *Labov v. Lalley*, 809 F.2d 220 (3rd Cir. 1987); *Burch v. Apalachee Community Mental Services*, 840 F.2d 797 (11th Cir. 1988), cert. granted, sub. nom. *Zinermon v. Burch*, 109 S. Ct. 1337 (1989); *Freeman v. Blair*, 793 F.2d 166 (8th Cir. 1986), *vacated* 107 S.Ct. 3254 (1987). Whether or not these cases were correctly decided, the case at bar, because of its unusual facts, would not serve to guide the Circuits in the frequently recurring types of fact patterns, particularly the employment cases, discussed above. The inchoate and transitory nature of Easter House's license claim, the involvement of a private party, and Easter House's waiver of formal hearing rights offered by the State distinguish this case from the cases cited by Easter House as conflicting.

III. EVEN IF THE *PARRATT* ISSUE WERE REACHED, THE DEFENDANTS WOULD HAVE A QUALIFIED IMMUNITY FROM MONEY DAMAGES.

Even if the Seventh Circuit's holding on the *Parratt* issue were reversed, the result in the case probably would not change. Respondents would still be entitled to a qualified immunity from money damages. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). It could not be said in 1975, or even today, that the DCFS officials violated any "clearly-established" constitutional right of Easter House. Easter House has never cited any case, decided before or

after 1975, that would suggest the respondents violated any clearly-established constitutional rights in their handling of this unique dispute between two private adoption agencies.

The jury charge merely stated that Easter House had a right to own and possess property, and that any deprivation of its property under color of state law was impermissible unless it had a pre-deprivation hearing. The conspiracy instructions permitted liability to be imputed from Smith to the respondents very broadly. To the extent any guidance was given the jury at all, the district court charged that violation of Illinois law (the Illinois Child Care Act, Ill. Rev. Stat. 1973, ch. 23 § 2218) could be evidence of a constitutional violation. This, too, is contrary to this Court's holding in *Davis v. Scherer*, 468 U.S. 183 (1984), that a violation of state law does not remove qualified immunity.[6]

The jury charge impermissibly posed the legal issue at such an abstract level of generality that it violated this court's holding in *Anderson v. Creighton*, 107 S.Ct. 3034 (1987): "[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right," and that "in the light of preexisting law the unlawfulness must be apparent." Id. at 3039. All public officials know, or should know, they should not engage in conspiracies to deprive people of "property." To say this in so general a way (as this jury

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[6] Judge Easterbrook hit the nail on the head when he said, "At bottom, all this case is about – all most *Parratt* cases are about – is a state official's violation of state law." *Easter House v. Felder*, 879 F.2d at 1478 (concurring opinion).

was instructed) is impermissible under *Anderson*. The real issue for purposes of qualified immunity is whether these state officials could have known in 1975 that their discretionary actions could be interpreted by a federal jury as a conspiracy. To the extent such an interpretation depends on the Illinois Child Care Act, Illinois law concerning corporate names (another state law issue on which liability was predicated), or the district court's erroneous charge that a pre-deprivation hearing is always required, the DCFS respondents could not have known then or now that their actions were unlawful in the constitutional sense. Nor could they have known that Smith's actions could be imputed to them so broadly. The simple fact is that Easter House was accorded fundamental fairness, and was never deprived of a hearing at a "meaningful time and in a meaningful manner."

Thus, even if the *Parratt* issue is reversed by this court, additional grounds for affirmance still exist and would have to be considered by this Court or the Seventh Circuit on remand.

CONCLUSION

This Court has taught that the Constitution is not a "font of tort law" and that a proper respect for the States should preclude "federalizing" every conceivable common law tort claim involving state government officials. Federal courts have handled this case for thirteen years. They never should have – it was a state law case from the beginning. The time has come for this case to reach its

end. We respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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